IN THE COURT OF CRIMINAL APPEALS
STATE OF TEXAS

No. 25,210

W. L. GELLING,

Appellant

v.

STATE OF TEXAS,

Appellee

STATEMENT IN OPPOSITION TO APPELLANT'S STATEMENT OF JURISDICTION AND MOTION TO DISMISS OR AFFIRM.

The appellee in the above-entitled cause for its joint statement in opposition to appellant's statement as to jurisdiction herein, and in support of appellee's motion to dismiss or affirm, respectfully show the following:

I. Statement of Issues on Appeal

The question sought to be presented in this appeal is appellant's claim that an ordinance of the City of Marshall, Texas, establishing a Board of Censors with authority to examine and censor "all pictures or vaudeville shows which may be offered by any picture theatre or show for public exhibition," denies to him freedom of speech and press in violation of the First and Fourteenth Amendment to the Constitution of the United States. This claim appellee denies and the Texas Court of Criminal Appeals,

in the opinion and judgment here challenged, determined the question so raised adversely to appellant. The court concluded that the main question presented by appellant is controlled by *Mutual Film Corp.* v. *Industrial Commission of Ohio*, 236 U.S. 230 (1915), and *RD-DR Corporation* v. *Smith*, 183 F. 2d 562 (C.C.A. 5th 1950) *cert. denied* 340 U.S. 853 (1950).

Appellant here seeks to raise three propositions concerning the constitutionality of the ordinance in question:

1. The ordinance, on its face, is invalid as a prior restraint of freedom of speech and press;

2. The ordinance is vague and indefinite and sets no proper standard for guidance of the administrative body established to administer the ordinance; and,

3. The Board of Censors abused its discretion in banning the exhibition of the particular motion picture involved in this appeal.

II. No Substantial Federal Question Is Presented by the Attempted Appeal

The question presented in appellant's first proposition was clearly presented to the Texas Court of Criminal Appeals and decided by that Court on the basis of the Federal Constitution. The right of a state, or subdivision thereof, acting under the police power, to provide for censorship of motion pictures has been upheld by this Court and is now well settled. *Mutual Film Corp.* v. *Industrial Commission of Ohio, supra.* This has formed the basis of a great body of decisions in the state and lower federal courts. See Notes, 64 A.L.R. 505 (1937) and 126 A.L.R. 1363 (1940). The most recent lower federal court decision involving this issue to reach this Court is *RD-DR Corporation* v. *Smith, supra,* in which the *Mutual Film* case was followed. These decisions are decisive of every point presented in this appeal. There would appear to be no necessity to repeat the arguments in support of the

power sought to be exercised by the City of Marshall since those arguments have been so recently presented to this Court. *RD-DR Corporation* v. *Smith, supra; Burstyn* v. *Wilson,* 303 N.Y. 242, 101 N.E. 2d 665 (1951) *probable jurisdiction noted* 20 Law Week 3211 (February 4, 1952).

It is therefore respectfully submitted that the questions presented in this Appeal have long ago been so definitely determined that no substantial question is presented by this appeal entitling appellant to invoke the jurisdiction of the Supreme Court of the United States. *Zucht* v. *King,* 260 U.S. 174 (1922); Rule 12, Rules of the United States Supreme Court.

Appellant relies upon *Burstyn* v. *Wilson, supra,* to show the substantiality of the questions presented. The lack of time allotted for preparation of this statement prohibits the securing of the briefs in that case in order to determine the exact questions presented. From the available information, it would appear that there is involved in the *Burstyn* case a question which was not before the Court in the *Mutual* case and is not presented in this appeal. No question is here presented with regard to the effect of censorship of motion pictures upon the right of religious freedom. That question, apparently, had not been a subject for decision by this Court and it would appear that is the reason for the Court's action in noting probable jurisdiction in the *Burstyn* case.

III. No Federal Question Is Presented by Appellant's Second and Third Propositions

After deciding that the ordinance of the City of Marshall was not, on its face, in violation of the First and Fourteenth Amendments of the Federal Constitution, the Texas Court of Criminal Appeals stated:

> "Other questions raised by the appeal have been considered and are deemed to be of little importance. We

cannot sustain them. The judgment of the trial court is affirmed."

The grounds for this portion of the decision are not stated in the opinion. It is well settled that where it is not clear whether the judgment in a case of the sort presented here rests on a Federal ground or an adequate state ground, this Court will not review the judgment appealed from unless it affirmatively appears that the Federal question was decided and its decision was essential to a deposition of the case. *Herb* v. *Petcairn*, 324 U.S. 117 (1945).

Appellant's second proposition presents the question of the vagueness or indefiniteness of the ordinance and whether it sets a standard to guide the Board of Censors. On page 2 of the brief for appellee, Texas, in the Court of Criminal Appeals, *Xydias Amusement Co.* v. *City of Houston*,, 185 S.W. 415 (Tex. Civ. App. 1916, error ref.), was cited in support of the judgment of the trial court. In that case the court considered an ordinance of the City of Houston, Texas, which provided that the Board of Censors "grant no permit for the giving of any entertainment or showing of any picture, or series of pictures, which, in the opinion of the Board, is obscene, indecent or immoral, or is contrary to good morals or public decency, or is calculated to promote or encourage racial or sectional prejudice, immorality or indecency. . . ." It was claimed that this ordinance was invalid on the ground that it was unreasonable, vague and indefinite, and that it delegated arbitrary power and authority to the Board of Censors to forbid the exhibition of pictures without refernce to the character of the pictures, there being no standard set out in the ordinance for the guidance of the Board.

In overruling these contentions and upholding the ordinance, the Court stated:

> "Moving picture exhibitions are subject to police surveillance and control in the interest of public

morals, and it is the right and duty of the city of Houston, under its express charter powers and under the general exercise of its police powers, to regulate, permit or forbid such exhibitions, and to this end to appoint a board of censors, clothed with such reasonable authority as is necessary to effect the purposes of their appointment." (185 S.W. at 418.)

The portion of the ordinance of the City of Marshall comparable to that in question in the *Xydias* case provides that:

> . . . If, upon such censorship or examination, said Board is of the opinion that such picture or vaudeville so proposed to be exhibited is of an immoral character or of such character as to be prejudicial to the best interests of the people of said city, if publicly shown. . . ."

This standard is similar in many respects to that examined in the *Texas* case and the Texas Court of Criminal Appeals may properly have based its decision upon that case.

Appellant presents in his third proposition the contention that the Board of Censors abused its discretion in banning the exhibition of "Pinky." Again, there are very adequate state grounds for this portion of the Texas court's decision. It is the rule in Texas, as in most other jurisdictions, that any party aggrieved by an administrative decision is entitled to a judicial review and the administrative action will be overturned if illegal, arbitrary, or capricious. *Board of Firemen's Relief & Retirement* v. *Marks*, — Tex. —, 242 S.W. 2d 181 (1951).

There are, therefore, "adequate state grounds" upon which the Texas Court could have rested its decision of appellant's second and third propositions and, conse-

quently, they do not raise questions which this Court should review.

IV. Appellant's Third Proposition Was Never Presented to the Texas Courts

Appellant admits on page 9 of his Statement as to Jurisdiction that in the trial court "the appellant disclaimed an intent to challenge the action of the Board of Censors as an abuse of discretion under the Ordinance." Appellant does not raise this point in his brief in the Texas Court of Criminal Appeals.

This Court has stated many times that it will not review matters not presented to the State Courts. The statement of Mr. Chief Justice Stone in *McGoldrick* v. *Campagnie Generale Transatlantique*, 309 U.S. 430 (1940), is particularly applicable here:

> "But it is also the settled practice of this Court, in the exercise of its appellate jurisdiction, that it is only in exceptional cases, and then only in cases coming from the federal courts, that it considers questions urged by a petitioner or appellant not pressed or passed upon in the courts below . . . In cases coming here from state courts in which a state statute is assailed as unconstitutional on grounds not properly presented, due regard for the appropriate relationship of this Court to state courts requires us to decline to consider and decide questions affecting the validity of state statutes not urged or considered there. It is for these reasons that this Court, where the constitutionality of a statute has been upheld in the state court, consistently refuses to consider any grounds of attack not raised or decided in that court.
>
> ". . . In the exercise of our appellate jurisdiction to review the action of state courts we should hold ourselves free to set aside or revise their determinations only so far as they are erroneous and error is not to be

predicated upon their failure to decide questions not presented. Similarly their erroneous judgments of unconstitutionality should not be affirmed here on constitutional grounds which suits have failed to urge before them, or which, in the course of proceedings there, have been abandoned."

Those "reasons of peculiar force" are applicable here since Petitioner attacks the constitutional validity of an ordinance of a city in Texas passed under its delegated legislative authority. This Court has been unwavering in the application of the doctrine that it will not consider points not presented to the highest State court.

WHEREFORE, appellee respectfully moves that the within appeal be dismissed or that the judgment of the Court of Criminal Appeals of the State of Texas be affirmed.

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Supreme Court of the United States

OCTOBER TERM, 1951, No. 707 ....

W. L. GELLING,

Appellant,

—*vs*—

THE STATE OF TEXAS,

Appellee.

REPLY TO MOTION TO DISMISS OR AFFIRM

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Supreme Court of the United States

OCTOBER TERM, 1951, No. ....

W. L. GELLING,
Appellant,

—*vs*—

THE STATE OF TEXAS,
Appellee.

REPLY TO MOTION TO DISMISS OR AFFIRM

Appellant's statement as to jurisdiction sets forth three Federal questions presented by this appeal:

(1) Whether the Marshall Censorship Ordinance is invalid on its face as a prior restraint of freedom of speech and press, in violation of the First Amendment, made applicable to the States by the Fourteenth;

(2) Whether the Ordinance, in authorizing prior restraint on the vague and indefinite ground that a motion picture is "of such character as to be prejudicial to the best interests of the people" of the City "if publicly shown", conflicts with the Amendments;

(3) Whether the Ordinance, as applied to bar the exhibition of the motion picture "Pinky," conflicts with the Amendments.

The appellee contends that the first question raised is unsubstantial; that the disposition of the second and the third rests upon adequate State grounds; and that the third

was not presented in the Texas courts. The points thus made are plainly without merit.

I.

In urging that the first question is unsubstantial, appelee relies, as did the Court below, upon *Mutual Film Corp.* v. *Ohio Industrial Commission*, 236 U. S. 230. The reasons why that decision calls for re-examination by the Supreme Court have been set forth in our statement. We stand upon what is said there.

II.

The contention that the claim of invalidity because of absence of sufficient standards has been answered upon State grounds is, we submit, entirely unintelligible. Invalidity was claimed under the First and Fourteenth Amendments; it can only be disposed of on those grounds. That Texas perceived no objection to the challenged ordinance under the State constitution or to that sustained in *Xydias Amusement Co.* v. *City of Houston*, 185 S. W. 415 (1916) is, of course, irrelevant. Validity under the constitution of the State has been established. Appellant's claim is that the ordinance conflicts with the law of the land. The question was admittedly in issue and no argument is needed to establish that the State's denial of the Federal right asserted cannot be referred to a State ground.

III.

It is also argued that adequate State grounds support the denial of the claim of invalidity as applied to bar the exhibition of the motion picture "Pinky." The ground adduced is the suggestion that appellant might have brought suit to set aside the action of the Board of Censors, citing

Board of Firemen's Relief & Retirement v. *Marks*, 242 S. W. 2d. 181 (1951). But granting arguendo that, despite the absence of a statutory method of review, the law of Texas gives some civil remedy to review an administrative order, the *Marks* case does not hold that such a remedy must be pursued. There is no reason to doubt that in Texas, as elsewhere, absent express statutory provision to the contrary, an administrative order may be challenged in defending a suit for enforcement of the order or a prosecution for its violation. *Cf. Estep* v. *U. S.*, 327 U. S. 114; Davis, Administrative Law, p. 752; Whitney R. Harris, The Administrative Law of Texas, 29 Texas Law Review, p. 214, 223-4 (1950).

Far from being adequate, the alleged State ground does not exist.

IV.

It is contended, finally, that the appellant did not present in the Texas courts the claim that the ordinance was invalid as applied. It is true that the appellant did not claim in Texas an abuse of discretion by the Censors as a matter of State law. But, as we have explained in our statement, this disclaimer was accompanied by an insistence on a challenge to the ordinance as applied, under the First and the Fourteenth Amendments. These are separate issues. The State point was not presented. The Federal point was pressed, as we have shown, upon motion to quash and motion for direction. And the bill of exceptions, which governs in the Texas Court of Criminal Appeals (*Wilson* v. *State*, 225 S. W. 2d, 565, 566)[1] specifically claimed that

[1]See also *Bowers* v. *State*, 167 S. W. 2d 203, 204; *Reed* v. *State*, 162 S. W. 2d 109; *Simpson* v. *State*, 217 S. W. 2d 1013, 1015; *Tishmacher* v. *State*, 221 S. W. 2d 258, 262.

the ordinance was invalid as "applied to the defendant" (R. transcript p. 50, 85).

For the foregoing reasons, we submit that the motion to dismiss or affirm should be denied and that probable jurisdiction should be noted.

New York, New York,
April 14, 1952.

Respectfully submitted,

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